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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD O. BERTOLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial when the trial judge, having become aware of juror misconduct, responded with an inquiry that was at once superficial, secret and one-sided?

2 Whether the district court erred in concluding that Petitioner obstructed justice by lying to an SEC Field Investigator, where such a conclusion is directly contrary to this Court's decision in *United States v. Aguilar*, 115 S.Ct. 2357 (1995).

3. Whether the Court should resolve a split between the circuit courts of appeal concerning whether U.S.S.G. § 2J1.7, prescribing a three point upward adjustment when a defendant commits an offense while on pretrial release, may be imposed upon a defendant who had not been informed of this added punishment?

4. Whether the district court improperly divided petitioner's offense of conviction into three groups under U.S.S.G. § 3D1.2, notwithstanding that the only "victim" of the obstruction of justice conspiracy was the government?

5. Whether the district court violated petitioner's rights under the Jencks Act by refusing to order production of an affiant's prior statements during a sentencing hearing?

6. Whether the district court imposed a vague and overbroad condition of Supervised when it prohibited petitioner's continued association with any person or entity in the securities industry?

7. Whether this court should review the district court's order allowing trial transcripts to be submitted to the deliberating jury?

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Petitioner RICHARD O. BERTOLI respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit dated December 4, 1995 (1b). Rehearing was denied January 10, 1996 (1a).

CITATION OF OPINIONS BELOW

The 629 page opinion of the District Court, dated March 28, 1994, is submitted as a lodging with the Clerk's Office under separate cover by permission of the Clerk, and is published. *United States v. Bertoli*, 854 F.Supp. 975 (D.N.J. 1994). The opinion of the District Court (on remand) dated March 22, 1995, is annexed as Appendix C, and has not been published.

The opinion of the Third Circuit Court of Appeals, on the first appeal, dated October 28, 1994, is annexed as Appendix at D and has been published. *United States v. Bertoli*, 40 F.3d 1384 (3d Cir. 1994). The judgment order of the Third Circuit (on remand), dated December 13, 1995, is annexed as Appendix B, and has not been published. The order of the Court of Appeals denying rehearing, dated January 10, 1996, is annexed as Appendix A.

STATEMENT OF JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals upholding the conviction and sentence under 28 U.S.C. § 1254. This Petition is being filed within 90 days of the circuit court's January 10, 1996 order denying Rehearing.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the complete citation to the Constitutional and Statutory Provisions Involved is annexed hereto as Exhibit E. Those provisions include: 18 U.S.C. § 3147. Penalty for an offense committed while on release; 18 U.S.C. § 1503. Influencing or injuring officer or juror generally; 18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees; Fed.R.Crim.P. 26.2(a) & (g), Production of Witness Statements; Fed.R.Crim.P. 32(c)(2), Sentence & Judgment; Fed.R.Crim.P. 43, Presence of Defendant; U.S.S.G. § 2J1.2, Obstruction Of Justice; U.S.S.G. § 2J1.7, Commission Of Offense While On Release; U.S.S.G. § 3B1.1, Aggravating Role; U.S.S.G. § 3D1.1, Procedure For Determining Offense Level On Multiple Counts; U.S.S.G. § 3D1.4, Determining The Combined Offense Level; U.S.S.G. § 4A1.1, Criminal History Category.

STATEMENT OF THE CASE

This case raises important issues with respect to a trial court's obligations to deal with premature jury discussions about the guilt of a defendant. As noted below, the court was presented with cross-accusations from two jurors that the other had expressed opinions about the defendant's guilt before receiving the judge's instructions. The court chose to tilt the process in favor of one juror without making any proper inquiry or investigation of the matter and without conducting any corrective voir dire of other jury members. Review is necessary in order to afford district courts with proper standards to meet this recurring problem.

In addition, the district court misapplied the Sentencing Guidelines in at least three ways:

(1) the district court placed defendant in Criminal History category II rather than category I based on its conclusion that defendant committed a crime while on probation, thereby increasing his maximum sentence under the Guidelines by seven months. This was error since the alleged crime committed on probation was not a crime, following this Court's decision in *United States v. Aguilar*, 115 S.Ct. 2357 (1995).

(2) the district court increased defendant's offense level score by two points based on its conclusion that defendant committed a crime while on pretrial release, thereby increasing his maximum sentence under the Guidelines by 15 months. This was error since defendant was never warned of these consequences when he was originally released, while other warnings were given to him. There is a serious split in the circuits as to whether such warnings must be given as a predicate for increasing offense levels under the applicable statute and Guideline.

(3) the district court increased defendant's offense level score by three points (contrary to the recommendation of the probation department) based on its conclusion that there were three separate victims of his crime, namely the SEC, the federal grand jury and the federal district court. The three point increase raised the maximum sentence under the Guidelines by 14 months. This was error since the only victim was the United States, and the district court's analysis totally distorts the intent and meaning of the Guidelines.

In addition to these errors in the application of the Guidelines, important issues were raised as to procedural requirements in the sentencing process, in particular whether Jencks Act materials must be produced at the sentencing hearing when affidavits are submitted instead of live testimony. The district court's refusal to order production of all prior statements of an affiant is directly counter to the requirements of Rules 26.2 and 32(c) of the Federal Rules of Criminal Procedure. This significant issue in the administration of criminal justice also requires review by this Court.

STATEMENT OF FACTS

Petitioner Richard O. Bertoli was convicted on March 28, 1994 in United States District Court for the District of New Jersey (Lechner, D.J.), of one count of conspiring to obstruct justice, in violation of 18 U.S.C. § 371, and one count of obstructing justice, in violation of 18 U.S.C. § 1503. He was acquitted of conspiring to violate the RICO statute, of violating the RICO statute and of three additional counts of obstructing justice. He was initially sentenced principally to 100 months, a fine of $7,000,000 and to three years supervised release, a condition of which was that he have "no association, directly or

indirectly, with any person, firm or business involved in any way with the securities industry."

On Petitioner's first appeal to the Third Circuit, that court rejected Petitioner's claim of jury misconduct, but vacated the fine and sentence and remanded the matter to the district court. The district court thereafter resentenced Petitioner to 78 months imprisonment, a $100,000 fine and a three year period of supervised release, with the same condition against securities industry associations. The Third Circuit thereafter affirmed the district court's judgment without opinion (1b).

Petitioner and others were charged with manipulating the stock prices of certain Initial Public Offerings ("IPOs"), and thereafter attempting to obstruct SEC and criminal investigations into this conduct. The alleged manipulation involved efforts to artificially create demand for the stocks through various artifices. The obstruction charges included a general conspiracy count and several substantive counts. These charges alleged, *inter alia*, that Petitioner destroyed documents, hid assets and encouraged witnesses to make false statements. As noted above, Petitioner was acquitted of manipulating the stocks and of several substantive obstruction counts. He was convicted of the general obstruction conspiracy and of obstructing justice by moving assets from the Cayman Islands to Andorra.

At the initial sentencing proceeding, the district court sentenced Petitioner as indicated above. Several days after imposition of sentence, the court issued a 629 page opinion, most of which addresses issues not relevant to this Petition. Petitioner then appealed to the Third Circuit Court of Appeals, raising four issues, to-wit: (1) juror misconduct; (2) sending transcripts of witnesses' testimony to the deliberating jury; (3) the district court's use of the current Guidelines book and its application of

the "cross-referencing" provision in Guidelines § 2J1.2(c)(1); and (4) the $7,000,000 fine. Additionally, Petitioner asked that a new judge be assigned should the case be remanded.

On the first appeal, the Third Circuit rejected the first two issues raised by Petitioner but agreed with the third and fourth. It therefore vacated Petitioner's 100 month sentence and fine of $7,000,000, and remanded the case to the district court for resentencing.

On remand to the district court, several issues were raised by the defendant regarding the resentencing, including:

1. The district court should not divide the conspiratorial conduct alleged in count three of the indictment into three groups under U.S.S.G. § 3D1.2 because the United States was the only "victim" of the charged conduct and all of the charged conduct was part of the same scheme or plan.

2. The district court should not impose a four point upward adjustment under U.S.S.G. § 3B1.1 for Bertoli's role in the offense of conviction.

3. Bertoli should not be placed in Criminal History Category II under U.S.S.G. § 4A1.1(d) because Bertoli did not commit the offense of conviction while on probation.

4. Bertoli's guideline should not be adjusted upward three points under 18 U.S.C. § 3147 and U.S.S.G. § 2J1.7 for his having committed a crime while on pretrial release, because he was not given notice of the adjustment at the time of his release, but, rather, was given a list of possible consequences that did *not* include this adjustment.

5. Bertoli's guideline should not be adjusted upward under U.S.S.G. § 2J1.2(b)(2), for his alleged substantial interference with the administration of justice.

The district court declined to consider issues 1-4 because, although they had been raised in, and rejected by, the district court during the earlier sentencing proceedings, they had not been raised before the Third Circuit during the first appeal. To no avail, defendant pointed out that the Third Circuit had vacated Bertoli's fine and sentence without restriction, and therefore had remanded for a sentence *de novo*.

A hearing was held before the district court regarding the government's requested adjustment under U.S.S.G. § 2J1.2(b)(2), on the ground that Bertoli substantially interfered with the administration of justice. The government relied on an affidavit of the case agent, John Cahill, and Cahill was then offered for examination by the defense. Defense counsel then requested Cahill's prior statements under the Jencks Act, as codified under Fed.R.Crim.P. 26.2(a) and 32(c)(2). The court however, denied the request and found that this, and all other proposed adjustments, were proper.

The district court then resentenced Petitioner to 78 months, the maximum under the applicable guideline of 25 and the assigned Criminal History Category of II. It also imposed a $100,000 fine and declared, as a special condition of supervised release, that Bertoli "have no association, directly or indirectly, with any person, firm or business involved in any way with the securities industry."

Petitioner appealed once again to the Third Circuit, raising the sentencing issues discussed above. The government asserted that certain of the issues were waived by their not having been raised during the initial appeal. Petitioner again pointed out that the case had been remanded for sentencing *de novo*, and that, in any event, several of the issues either were not implicated by

the earlier proceedings or were fundamentally changed following the direct appeal.

The Third Circuit, after oral argument, affirmed Petitioner's conviction and sentence, without comment.

REASONS FOR GRANTING THE WRIT

The instant Petition asks this Court to address recurring issues concerning the district court's response to alleged juror misconduct, and also concerning the application of the Sentencing Guidelines. One issue is the subject of a clear split in the Circuit Courts of Appeal (*see* Point III), and another is directly controlled by a recent case of this Court, *see United States v. Aguilar*, 115 S.Ct. 2357 (1995).

I.

THE TRIAL JUDGE, HAVING BECOME AWARE OF JUROR MISCONDUCT, RESPONDED WITH AN INQUIRY THAT WAS AT ONCE SUPERFICIAL, SECRET AND ONE-SIDED

Petitioner's trial was marred by an extraordinary series of events involving charges and counter-charges of misconduct by the jurors. The district court's unenlightened strategy for dealing with these events, considered together with the circuit court's erroneous appellate analysis, suggests that this Court should clarify the proper procedures to follow when similar problems arise.

During a break in the charge to the jury, Juror 6 "mentioned" to the trial judge that other jurors had disregarded the court's admonition not to discuss the case (trial transcript at 6760, annexed herein as Exhibit F, 1f). Rather than make any effort to determine either the timing or substance of these

discussions, the judge brought Juror 6 into the courtroom and questioned her in open court (*id.*). She said that one alternate juror had mentioned "an opinion about the case" and that two other alternates had "mentioned" something about the case to her; she denied that it would affect her impartiality (2f). Juror 6 was instructed by the court not to reveal the substance of the comments attributed to the three alternate jurors, and to this day the record does not disclose it (2f).

Even before hearing from the accused alternates, the trial judge announced that he intended to discharge them (3f). (The three alternates were the only African-American jurors on the panel). Brushing aside defense counsel's attempt to question the procedure, the trial judge brought in the three alternate jurors. He instructed them, too, not to reveal the substance of any discussions or comments and, assuming without asking them whether they had, in fact, discussed the case with Juror 6, only asked each alternate juror whether he or she had mentioned the case to "*anybody else*" (3f-4f). They denied doing so; the trial judge discharged all three. The court thereupon denied defense counsel's request that the other jurors be questioned or that Juror 6 be excused (6f). In doing so, the court accepted Juror 6's unexamined statement that she could be impartial, and refused the request of one of the excused alternates to speak to the court.

At the end of the charge, before the jury began deliberating, defense counsel again expressed concern about the possible effect of the jury discussions, which the court found baseless (10f-11f). After instructing counsel for both parties not to approach the jurors, the judge spoke with the three dismissed alternate jurors and Juror 6 *in camera* (12f). What was said there, and the trial court's response to it, was remarkable.

The transcript reflects that the court separately summoned each of the alternates to chambers, the first being Juror 13, Mr. Bowen, a self-employed contractor. At the outset, the district judge told Mr. Bowen he did not believe Mr. Bowen had "done anything wrong" but that he "just h[ad] to make sure both the parties out there are satisfied" (12f).

The district court then confronted Mr. Bowen directly with Juror 6's accusation -- that Mr. Bowen "mentioned something to her and that's what she mentioned to me and that's what I asked you about out in court." The court asked Mr. Bowen, "Did you express an opinion as to guilt or innocence?" Mr. Bowen replied he had not (12f). He then began to explain: "That's why I was wondering why I was excused because -- " but was cut off. The court then complimented the jury on its dedication, repeated to Mr. Bowen Juror 6's accusation, and then said: "I just want to put it on the record so these attorneys have their record. It will be sealed.... I'm just trying to maintain the integrity of the process" (13f).

Immediately thereafter, Mr. Bowen stated that he "would like to tell [the court] what happened" (13f). He told the court how, that morning, he had walked into the courthouse with Juror 6, who asked: "How in the hell does [Mr. Bertoli] think he's going to get away with this?" to which he replied, "Bertoli's innocent until he's proven guilty" (14f). The court responded, "[I]t's no big deal. There is no problem. I see absolutely no consideration [sic]" (14f-15f). Mr. Bowen insisted: "But there is a problem. There is a problem." The court attempted to interject, but Mr. Bowen continued: "The problem is with her because *she's been expressing opinions all along in the trial*. No one has communicated with her" (15f). (emphasis added). The court rejoined: "Great. That's terrific. That's terrific." Mr.

Bowen persisted: "*She's the only one that has expressed an opinion* and for the three of us to take the weight, this looks very bad" (15f) (emphasis added). The court responded once again, "I'm satisfied that there is just no problem. I'm just doing this because the attorneys want me to follow up" (16f).[1]

The trial court then summoned, individually, the other dismissed alternates, Juror 14, Ms. Joans, and Juror 15, Ms. Burroughs. The court asked two questions of each: whether either had said "anything to anybody about guilt or innocence?" and whether "anybody [said] anything to you?" Receiving the answer "no" to each question, the interviews were concluded (17f).

Juror 6, Ms. Wheil, was interviewed last. The court asked her five leading questions and elicited from her that she would deliberate fairly and impartially, "[f]rom scratch" (18f). *The court did not confront Ms. Wheil with Mr. Bowen's pointed accusations* and did not dismiss her, as he had dismissed the alternates based on her uncorroborated accusations.

After concluding the interviews, the court entered into the sealed record seven pages of comments and findings, concluding that Ms. Wheil was truthful and that Mr. Bowen was lying, motivated "more out of pique than out of accuracy" (19f). The court ostensibly rested its conclusions on its "opportunity to see facial expression, to see how they responded, the hesitancy or lack of hesitancy in the way they responded, the words they used and just their overall demeanor and the feeling I got from speaking with them" (*id.*).

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1 Mr. Bowen may have been referring to the fact that he and the other two dismissed alternates were African-American, whereas Juror 6 and the rest of the deliberating jury was white. The court's entire questioning of Mr. Bowen appears at 12f-17f.

Despite the statement of Mr. Bowen that Ms. Wheil had expressed opinions during the trial, the trial judge did not ask either of the other alternates, Ms. Wheil, or any of the other jurors about the assertion. Nor did he inform counsel of Mr. Bowen's allegation. Indeed, when defense counsel moved to unseal the records of the *in camera* transcript to assist in the preparation of post trial motions (25f), the court denied the motion, saying "there is nothing there and I do not believe that it is appropriate to unseal that," and suggesting that counsel go to the Court of Appeals if he insisted on seeing the transcript (26f). The court finally unsealed the record during a December 17, 1993 telephone conference after defense counsel identified the issue involved as a potentially meritorious appellate issue supporting Mr. Bertoli's request for bail pending appeal.

The legal issue presented here is a recurring one in federal criminal cases: What inquiry must a court conduct when one juror discloses that there has been premature jury discussions of the case, particularly premature expressions concerning the guilt or innocence of the defendant?

The issue is illustrated by a decision by the Fifth Circuit in which the court made the proper inquiries. Those measures contrast starkly with the totally inadequate steps taken by the district court here. In *United States v. Webster*, 750 F.2d 307 (5th Cir. 1985), one juror disclosed to a marshall that another juror had expressed an opinion about the guilt of the defendant during final argument by counsel. The court took the following steps: (1) he interviewed the juror who made the disclosure to the marshall; (2) he then interviewed another juror to confirm that the improper statement had in fact been made by the offending juror; (3) he then interviewed each juror to determine whether they had heard the offending juror's remarks; (4) he then

informed the jurors that the remarks of the offending juror about the defendant's guilt were improper and a violation of the court's instructions; (5) he then asked each juror whether they could give the matter fair consideration without being influenced by the juror's remarks; and (6) he then excused the juror who made the premature remarks about guilt and replaced him with an alternate.

In other cases, where premature comments about the defendant's guilt have been made, the Courts of Appeal have insisted on the following minimum steps being taken: (1) inquiry to the other jurors to determine whether they heard any premature remarks about guilt; (2) inquiry to determine whether the remarks affected their ability to consider the case; (3) corrective voir dire to impress upon the jurors who heard the remark that they must disregard the premature statements and consider the matter fairly and openly; (4) in appropriate cases, removal of the juror who made the remark, as in the *Webster* case above. *See e.g., United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984)(all jurors questioned individually to determine whether they heard premature discussion of case; corrective instructions given; jurors who discussed case removed and replaced); *See also United States v. Resko*, 3 F.3d 684 (3d Cir. 1993)(conviction reversed when court made only cursory inquiry through written questionnaire of possible premature jury discussion of case).

None of the protective steps outlined above were taken here. Once alternate Juror 13 disclosed to the Court that Juror 6 had made the remark about Mr. Bertoli's guilt, the court had a duty to determine whether such a statement had in fact been made. *The court had every opportunity to do so since it immediately questioned the two other alternates and Juror 6 herself. But in conducting those interviews, the court never asked the obvious $64 question, namely whether – as Juror Bowen*

pointedly alleged -- Juror 6 had uttered a premature expression of opinion as to Mr. Bertoli's guilt. Indeed, the Court studiously avoiding asking the question.

Furthermore, the district court never took the most important protective steps thereafter, namely inquiring from each juror whether they had heard the offending remarks, warning them that such remarks were improper and a violation of the court's instructions and impressing upon each juror that they must give the matter fair and open consideration.

The district court's actions deprived any reviewing court of the ability to determine whether there had been any jury taint. *See Resko, supra*, 3 F.3d at 691: "We conclude that the district court erred by declining to engage in further inquiry -- such as individualized *voir dire* -- upon which it could have determined whether the jurors had maintained open minds."

The Court of Appeals inexplicably upheld the district court's steps in this case. It held that there was no duty to investigate further since the court interviewed the other two alternates, only Juror 13 made any accusations against Juror 6 and the court was entitled to make credibility determinations. (26e-27e & n.7). But as noted above, the court inexplicably never questioned the other alternates as to whether Juror 6 had made any premature remarks about Bertoli's guilt and never questioned Juror 6 about them either. Surely a court cannot prejudge the matter so cavalierly when it had so many reasonable alternatives before it to determine the facts. More important, it must make a proper inquiry so that a reviewing court can review the matter later.

This Court should review the matter and establish meaningful standards to guide district courts in the future.

Furthermore, the district court's perfunctory inquiry was made *in camera*. As a result, the defendant was not able to discover the accusations made about Juror 6 at the time and to make concrete suggestions about the accusations that the Court could act upon. The Court thus violated Petitioner's due process right to be present at all critical stages at his trial, as well as his 6th Amendment right to effective assistance of counsel and his right under Fed.R.Crim.Proc. 43 to be present at every stage of the trial. *See e.g., United States v. Gagnon*, 470 U.S. 522 (1983)(defendant has 5th Amendment right to attend conference with juror when presence required to secure a fair and just hearing).

The Third Circuit erroneously concluded that the defendant's presence was not required under the *Gagnon* rule. That determination was error. In any event, even if defendant's presence were not required, the district court was obliged to promptly disclose to defense counsel Mr. Bowen's accusations against Juror # 6. In view of the trial court's studied effort to avoid asking the correct and necessary questions, the absence of defendant or his counsel deprived defendant of his right to a fair and just hearing.

II.

THE DISTRICT COURT'S CONCLUSION THAT PETITIONER OBSTRUCTED JUSTICE BY LYING TO AN SEC FIELD INVESTIGATOR IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN *UNITED STATES V. AGUILAR*

The district court assigned Petitioner to Criminal History Category II upon finding, pursuant to U.S.S.G. § 4A1.1(d), that he committed the obstruction conspiracy offense charged in Count Three while on probation from his previous plea of nolo contendere in an unrelated case. Pursuant to the Guidelines, that

horizontal shift added seven months to Petitioner's maximum sentence.

The only conduct alleged to have been part of the obstruction conspiracy that pre-dated the termination of Petitioner's probation, however, was not a crime, according to *United States v. Aguilar*, 115 S.Ct. 2357 (1995), decided just before Petitioner's brief was filed in the Third Circuit. Accordingly, the § 4A1.1(d) adjustment was unfounded.

The one item of evidence submitted to show that Petitioner committed an offense while on probation was his suggestion to a securities broker, Robert Cooper, that he lie to SEC field investigator Amato, and falsely claim authorship of a research report favorable to one of the IPOs which was allegedly written by a co-conspirator and which the conspirators allegedly manipulated. The indictment alleged as an overt act of the broad-based obstruction conspiracy, and the district court found, that this conduct constituted obstruction of justice under 18 U.S.C. §§ 1503 and 1505.

This finding, however, was entirely undercut by this Court's decision in *Aguilar*. That case held that false statements made by the defendant to FBI agents did not violate § 1503's "endeavor to obstruct" language, absent evidence that the defendant knew that his false statements would be provided to the grand jury. This was so because:

> The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the Court's or grand jury's authority.

115 S.Ct. at 2362. This Court found the evidence insufficient to convict because "uttering false statements to an investigating

agent ... who might or might not testify before a grand jury is [not] sufficient to make out a violation of the catchall provision of § 1503." *Id.*

Here, of course, Cooper's supposed lies had no connection to any grand jury or judicial proceedings and his conduct therefore did not violate § 1503. This alone should be enough to reject a finding that the jury convicted Bertoli of this conduct, as the jury was thereby presented with a legally incorrect theory on which to find guilt.

The *Aguilar* decision also is relevant to the government's theory that 18 U.S.C. § 1505 would have provided a proper basis for the conviction of Bertoli for Cooper's false statements. Whereas § 1503 concerns efforts to influence grand and petit jury proceedings, § 1505 addresses proceedings before departments, agencies and committees. It too contains a "catch-all" clause, which provides:

> Whoever corruptly ... endeavors to influence, obstruct, or impede the due and proper administration of law under which any pending proceeding is being had before any department or agency of the United States ... [shall be punished].

The allegedly false statements of Cooper in this case did not occur before the SEC; on the contrary, they occurred during an informal interview of Cooper by SEC attorney Amato in March, 1983, prior to Cooper's receipt of an SEC subpoena, in mid-June 1993. As described by Amato, the interview of Cooper occurred "[d]uring the informal phase of the investigation" and was "an informal interview." In fact, it was conducted in the field, at Cooper's workplace, G.K. Scott.

Cooper's assertedly false statements, therefore, were not made during the formal SEC proceedings, nor was there evidence

that the statements would be admitted before such a proceeding through the testimony of Mr. Amato.

Sections 1503 and 1505 cover different territory, but do so in closely analogous ways. This Court's reasoning in *Aguilar* is directly relevant to the sufficiency of the evidence under both sections. *Aguilar*, applied to the instant facts, forecloses Petitioner's conviction for conspiring with Cooper to lie to Mr. Amato.

III.

THE COURT SHOULD RESOLVE A SPLIT BETWEEN THE CIRCUITS OF WHETHER U.S.S.G. § 2J1.7, PRESCRIBING A THREE POINT UPWARD ADJUSTMENT WHEN A DEFENDANT COMMITS AN OFFENSE WHILE ON PRETRIAL RELEASE, MAY BE IMPOSED UPON A DEFENDANT WHO HAD NOT BEEN INFORMED OF THIS ADDED PUNISHMENT

The district court adjusted Bertoli's offense level three points upward under Guidelines § 2J1.7 and 18 U.S.C. § 3147, because he allegedly committed a federal offense while on bail pending the instant indictment. This increased Petitioner's maximum guideline sentence by an additional fifteen months.

Petitioner argued this was improper because he had not been warned that this adjustment might result from his actions when he was first released on bail. On the contrary, he received certain warnings when he was released, but none pursuant to § 3147.[2]

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2 Upon being admitted to bail Bertoli was given a document purporting to advise him of the penalties for a violation, but which did *not* include a possible additional sentence under § 3147. The document, titled "NOTICE OF PENALTIES APPLICABLE TO THE VIOLATION OF CONDITIONS OF RELEASE," informed Bertoli only that, should he violate the release conditions, a warrant for his

There is a clear and deep split in the circuits regarding whether a person in Petitioner's shoes should be subject to the § 3147 punishment. The Fourth, Fifth, and Seventh Circuits hold he should not be, *see United States v. Onick*, 889 F.2d 1425, 1433-34 (5th Cir. 1989); *United States v. DiCaro*, 852 F.2d 259 (7th Cir. 1988); *United States v. Cooper*, 827 F.2d 991, 994 (4th Cir. 1987); *see also United States v. Night*, 29 F.3d 479, 480-81 (9th Cir. 1994) (sufficient that defendant given written warning of penalty). The Third and Sixth Circuits hold a defendant may be punished under § 3147 even without specific warning, *see United States v. DiPasquale*, 864 F.2d 271 (3d Cir. 1988) and *United States v. Lewis*, 991 F.2d 322 (6th Cir. 1993).

The split in the Circuits arises from the interplay of Section 3147 and 18 U.S.C. § 3142(h)(2)(A). The latter section requires the releasing judge to advise the person of "the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release." Section 3147 prescribes a sentence "of not more than ten years" for persons who commit felony offenses while released on bail." The Bail Reform Act of 1984, under which these sections were promulgated, does not expressly require that the releasing court comply with the notice requirement of Section 3142 before a sentencing court may impose penalties under Section 3147.

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arrest would issue, and he would be subject to any other penalties reflected on his Appearance Bond (which pertain to forfeiture of the amount of the bond, etc.). Additionally, he was informed that, should he willfully fail to appear as required, he would incur a forfeiture of any security he pledged and would be subject to an additional fine. Thus, Bertoli was led to believe that a violation of the conditions of bail would result in certain penalties, none of which included the penalty imposed here.

This clear and significant split between several of the Circuit Courts of Appeal makes the appropriate interpretation of Section 3147 ripe for this Court's consideration.

IV.

THE DISTRICT COURT IMPROPERLY DIVIDED PETITIONER'S OFFENSE OF CONVICTION INTO THREE GROUPS UNDER U.S.S.G. § 3D1.2, NOTWITHSTANDING THAT THE ONLY "VICTIM" OF THE OBSTRUCTION OF JUSTICE CONSPIRACY WAS THE GOVERNMENT

The district court determined that the conduct alleged in Count Three, charging conspiracy to obstruct justice, should be divided into three separate "groups" for Guidelines purposes, under Guidelines § 3D1.2. This resulted in a three point increase of Bertoli's offense level under Guidelines § 3D1.4. The effect of this increase was to raise the maximum guideline sentence an additional fourteen months.

The court's decision to create three "groups" was erroneous, because -- as the Pre-Sentence Report initially concluded[3] -- the only victim of the conduct charged in Count

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3 The Probation Department gave the following response to the government's objection that Probation had recommended the formation of only one group:

> Viewing this case in its totality, the probation office believes only one societal interest has been harmed as a result of the defendant's criminal conduct. The government's investigation into a significant stock fraud is the essence of this case, these efforts included investigations by the Securities and Exchange Commission, the convening of several Federal Grand Juries, and two Federal prosecutions. All of these law enforcement initiatives were undertaken to determine the extent of the defendant's role in this massive stock manipulation. Bertoli's obstructive conduct was

Three was the United States Government, and the charged conduct was all part of the same scheme or plan.[4]

Grouping analysis begins with Guidelines § 3D1.1, which requires the district court to (1) group the counts of conviction into distinct groups of closely-related counts; (2) determine the offense level for each group, pursuant to Guidelines § 3D1.3; and (3) determine the combined offense level of all groups using the rules specified in Guidelines § 3D1.4.

Section 3D1.2 requires that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." Counts involve "substantially the same harm," *inter alia*,

> (a) When counts involve the same victim and the same act or transaction.
>
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan ...

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undertaken, in the view of the probation office, to obstruct this investigation.

PSR at 40-41.

4 Somewhat ironically, in its discussion of another issue the district court described the singular nature of the investigations impacted by the conspiracy:

> The Government's investigation into the Stock Manipulation Schemes began approximately in 1982 and continued through 1992. It started with an administrative investigation by the SEC in 1982 which eventually led to the SEC Action in 1985. The SEC Action led to the Grand Jury Investigation which resulted in the criminal prosecution of Cannistraro in 1987 and Bertoli in 1989.

854 F.Supp. at 1130.

U.S.S.G. § 3D1.2 (a),(b).

Where a defendant has been convicted of a conspiracy count, grouping analysis requires the court to determine which objects of the conspiracy are encompassed in the jury's verdict, and then to analyze these objects under normal grouping rules, as if they were separate counts of conviction. *See* Commentary to § 3D1.2, Application Note 9, *citing* Guidelines § 1B1.2. *See also* § 1B1.2(d) and Application Note 5.

The district court found, upon reviewing Count Three, that there were five objects of the obstruction conspiracy, *i.e.*, to obstruct: (1) the SEC Investigation; (2) the SEC Action; (3) the criminal investigation by the grand jury (the "Grand Jury Investigation"); (4) the 1987 prosecution of Richard Cannistraro; and (5) the criminal prosecution of Bertoli himself (citing *Bertoli*, 854 F.Supp. at 1130). These five objects, said the court, should be considered as three separate groups, supposedly reflecting "interests ... so distinct as to constitute multiple victims" (854 F.Supp. at 1141). The court explained its reasoning, focusing on the assertedly "distinct societal interests" "invaded" by the offense conduct:

> The obstructions of justice invaded three distinct societal interests -- the societal interest in the proper conduct of (1) the federal district courts (the Securities and Exchange Commission ("SEC") lawsuit, Cannistraro's 1987 prosecution, and the instant prosecution), (2) federal grand juries (the grand jury investigation in the instant prosecution), and (3) federal administrative agencies (the SEC investigation).

(Slip op. at 12, Lodged with the clerk's office; *see also Bertoli*, 854 F.Supp. at 1142-1143). According to the court, if it failed to find separate groups, "it would make no difference whether a

defendant obstructed one proceeding or one hundred different proceedings because all of the counts would be grouped together and the defendant would be sentenced on the basis of a single offense" (854 F.Supp. at 1144).

The district court's reasoning is fatally flawed. As an initial matter, Guidelines § 3D1.2(b) provides that offenses should be found to involve "substantially the same harm" and therefore be grouped together when "counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan ..." Here, the government has consistently argued that Bertoli's objective in obstructing justice was to shield himself and his money from the United States government. Hence, all his acts involved the same "victim" -- the United States government -- and all were part of a "common scheme or plan" -- to avoid prosecution.[5]

The district court's concern that Bertoli would, in effect, receive a "pass" for multiple acts of wrongdoing if all his conduct were grouped together is not well taken. First, the same argument could be made in the context of any instance of multiple, separate acts, yet the Guidelines nevertheless contemplate the forming of only a single group in many such instances. *See, e.g.*, Guidelines § 3D1.2, Application Note 4. This was, in fact, the position of the Probation Department prior to the district court's first post-sentencing decision. *See* n. 2, *supra*. Second, the final offense level provides a range of

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5 To the extent it is determined that obstruction of justice is a "victimless crime," the "nature of the interest invaded by each offense" must be referenced, and "[a]mbiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, *i.e.*, to identify and group 'counts involving substantially the same harm.'" *See* Guidelines § 3D1.2, Application Note 2.

confinement, and the court is free to chose a sentence at the upper end of that range to reflect the seriousness of the overall offense conduct, which the district court in fact did on resentencing.

A third flaw in the district court's reasoning is that a defendant's commission of multiple acts in furtherance of a single obstructionist goal increases the likelihood that a specific offense characteristic will apply and thereby enhance sentence, *e.g.*, Guidelines § 2J1.2(b)(2) (substantial interference with administration of justice). Fourth, other aspects of sentence, such as the fine, the amount of restitution, and the conditions of supervised release may reflect the overall seriousness of the conduct. And fifth, in an unusual case, where the Guidelines prescribe a single group but the court believes the result to be unreasonably lenient, an upward departure under Guidelines § 5K2.0 may be permissible.

The district court's decision runs counter to rulings of courts from the Third Circuit as well as other circuits. The Third Circuit has previously addressed the issue of "whether offenses for which society is the victim are properly grouped together under the multiple count provisions of the guidelines..." *United States v. Riviere*, 924 F.2d 1289, 1304 (3rd Cir. 1991). In *Riviere*, the court considered the propriety of the district court's decision to separately group three firearms counts. It ultimately found that separate grouping was not appropriate, after addressing the same rules discussed above.

Similarly, in *United States v. Bradach*, 949 F.2d 1461 (7th Cir. 1994), the defendant's obstructionist conduct included lying before a grand jury and at three trials, stemming from an insurance fraud scheme. The government appealed from the district court's finding of a single group, claiming the harm to the United States was not the same for each false declaration. 949

F.2d at 1464. The Circuit Court affirmed the district court's decision, finding that the government's argument was foreclosed by its own agreement that the various counts involved the same victim (*i.e.*, the government) and that they "involve acts constituting part of a common scheme or plan." *Id.* These circumstances, concluded the court, required grouping under § 3D1.2. *Cf. United States v. Harper*, 972 F.2d 321 (11th Cir. 1992) ("while a series of drug trafficking offenses, or a combination of fraud and embezzlement offenses, for example, might be appropriately grouped for sentencing, grouping would be illogical in the context of combinations such as firearms trafficking and bid rigging, which are both in 3D1.2(d)'s first category, but not 'of the same general type,' nor under these facts, closely related").[6]

The government/district court in the instant case relied heavily on *United States v. Beard*, 960 F.2d 965 (11th Cir. 1992). There, the defendant, who owned two car dealerships, arranged for one of its suppliers to issue kickback checks to two of the defendant's employees. The employees would cash their checks and give most of the proceeds to the defendant, who did not report the income. When the first employee was prosecuted for tax evasion, the defendant paid him hush money to plead

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6 Footnote 5 of *Bradach* addresses the November, 1991 amendment to the perjury guideline, § 2J1.3(d), which provides that "[i]n the case of counts of perjury or subordination of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under § 3D1.2 (Groups of Closely-Related Counts)." The *Bradach* court observed that application of the amendment to the facts before it would have required a different outcome, but that the amendment would not be retroactively applied. Although a similar amendment has not been made to the obstruction guidelines, § 2J1.2, the two provisions otherwise parallel one another and suggest a similar result.

guilty. Two years later, the second employee was subpoenaed to a grand jury. The defendant importuned him to lie as well, but he cooperated instead and helped prosecute the defendant. The district court grouped separately the counts relating to the obstruction of the two employees, finding that one count obstructed the district court proceedings of the first employee and the other, the separate grand jury proceedings of the second.

The government in *Beard* acknowledged "that *United States v. Bradach*, [*supra*] is strongly against its position," 960 F.2d at 968, but the Eleventh Circuit, after quoting the district court's reasoning, found it "must give 'due deference' to the district court's informed judgments." 960 F.2d at 969.

The decision of the *Beard* court to find two distinct societal interests implicated by the "proper conduct of the district court and of the grand jury," 960 F.2d at 968, would appear at odds with the rule of other Circuits.

This Court should review this important issue relating to the application of this guideline rule.

V.

THE DISTRICT COURT VIOLATED PETITIONER'S RIGHTS UNDER THE JENCKS ACT BY REFUSING TO ORDER PRODUCTION OF AN AFFIANT'S PRIOR STATEMENTS DURING A SENTENCING HEARING

The instant point addresses a critical and recurring issue at sentencing: whether the government can insulate itself from Jencks Act production of prior statements of its witnesses by relying on affidavits of those witnesses, rather than presenting their live testimony.

The district court found that the Count Three obstruction conspiracy substantially interfered with the administration of justice and therefore imposed a three point upward adjustment

under Guidelines § 2J1.2(b)(2). This conclusion was based largely on facts contained in an affidavit of Special Agent John Cahill. Cahill's affidavit, filed the Friday before sentencing, summarized various unsworn statements previously submitted by the government on the same subject. After the affidavit was filed, and before cross-examination of Cahill by defense counsel, counsel request production of Cahill's prior statements under the Jencks Act, as codified in Fed.R.Crim.P. 26.2(a) and 32(c)(2). The request was refused, without explanation, although the government would argue on appeal that the Rules do not require the production of Jencks Act material when the government offers an affidavit in support of sentence, rather than live testimony.

There is no doubt that Rule 26.2 applies to sentencing hearings. *See* Rule 26.2(g) and Rule 32(c)(2).

The requirement that Jencks Act materials be provided at sentencing was added by the 1993 Amendments to the Rules, and was codified in Rule 32(c)(2). In its original form, the sole triggering event for the production requirement was "testimony of a witness," as there was no reference in the rule to "affidavit." *See also* 1993 Advisory Committee Notes ("Production of a statement is triggered by the witness's oral testimony"). The 1994 Amendments, however, added "affidavit" to the rule, thereby leaving no doubt that production would be required where a party relies at sentencing on an affidavit rather than on live testimony. This addition was a reasonable reaction to the realities of sentencing proceedings, where courts often rely on affidavits in making important sentencing decisions. Indeed, anomalous results would accrue should defendants be granted Jencks Act materials as to witnesses who give oral testimony and therefore are subject to cross-examination, yet are denied such

necessary impeachment material as to witnesses whose testimony is generated by unconfronted affidavit.

In light of the unquestionable mandate of Rule 32(c)(2), the district court's failure to order production of Agent Cahill's prior statements was error. The issue presented, however, is not limited in importance to the instant case, for the government routinely relies on all manner of non-testimonial assertions to support its position at sentence. Although district courts have discretion to accept evidence in this form, the government, by using this less reliable expedient, should not obtain the additional benefit of avoiding Jencks Act discovery. This Court should examine this important procedural issue.

VI.

THE SPECIAL CONDITION OF SUPERVISED RELEASE PROHIBITING PETITIONER'S CONTINUED ASSOCIATION WITH THE SECURITIES INDUSTRY IS INVALID AS VAGUE AND OVERBROAD

The district court imposed on Bertoli certain special conditions of supervised release, including a requirement that he

> have no association, directly or indirectly, with any person, firm or business involved in any way with the securities industry.

Sentencing Transcript at 69.

This condition is vague, overbroad and fundamentally unfair. It is, as well, the sort of catch-all provision that has become an all-too-common part of the sentence imposed on so-called "white collar" offenders. Accordingly, this Court should review the condition, order that it be stricken, and clarify the appropriate limits upon the imposition of similar conditions.

This Court held in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991) that any rule that fails to provide "fair notice" to those to whom it is directed "is void for vagueness." There is no question but that the "void for vagueness" rule applies to conditions of sentencing. *See, e.g., Hoffa v. Saxbe*, 378 F. Supp. 121 (D.D.C. 1974)(applying "void for vagueness" doctrine to condition of sentence that prohibits defendant from "indirect" management of labor organization).

In view of the serious definitional problems of what constitutes "indirect" association with a person or company in the securities industry, this Court should examine the question of whether such vague requirements are proper conditions of sentencing.

VII.

THIS COURT SHOULD REVIEW THE DISTRICT COURT'S ORDER ALLOWING TRIAL TRANSCRIPTS TO BE SUBMITTED TO THE DELIBERATING JURY

The district court allowed the deliberating jury to receive and consider the trail transcripts of numerous witnesses. Defense counsel objected on the grounds that the jury would give undue emphasis to portions of the transcript which the jurors read to each other. Or the testimony may be read or summarized in an incomplete or inaccurate manner. Defense counsel would have no opportunity to correct these errors. The usual cautionary instructions given when transcripts are read in open court cannot be given.

On the first appeal, the Third Circuit upheld the procedure. However, one judge specifically concurred, noting that the *Uniform Rules of Criminal Procedure* promulgated by the ABA would ban such transmission except under specified circumstances. Judge Roth disapproved of the practice and would

invoke the Court's supervisory powers over criminal justice to restrict the practice.

This Court should examine this crucial issue as to the circumstances under which trial transcripts can be made available to a deliberating jury.

CONCLUSION

This Court should grant the Petition for Certiorari in view of the important issues of criminal justice contained in the petition.

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